UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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Four Examples from Customs and Four From INS

Collective Bargaining Agreements And National Security Issues

The Homeland Security Bill (H.R. 5005) is still pending on the Senate floor, but it looks like a powerful Democratic Senator's efforts to delay it indefinitely have been abandoned.

Today, Senators Gramm and Miller and others proposed a second substitute amendment; the Lieberman substitute amendment has been pending for weeks. One of the key differences between the two substitute amendments is this: The Chief Executive Officer and Commander-in-Chief favors the Gramm-Miller amendment, but has threatened to veto the Lieberman Amendment.

The President strongly opposes the Lieberman Amendment because it would constrict presidential authority over national security. The Lieberman Amendment will give this President *and all subsequent Presidents* less authority within the Department of Homeland Security (DHS) than he has in any other department of the Federal Government.

Current law gives the President (5 U.S.C. §7103(b)[*]) and an agency head (5 U.S.C. §7112(b)(6)[**]) flexibility whenever the processes of collective bargaining come into conflict with the demands of national security. The Lieberman Amendment refuses to allow that same flexibility to be transferred to DHS.

How is it that collective bargaining processes can be relevant to national security?

Below are eight examples of labor-management disputes that might easily interfere with the war against terrorism. The examples below are *not* hypothetical, but real cases from the real world of the U.S. Customs Service and the Immigration and Naturalization Service:

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[*] See, RPC paper "How the Senate Is Threatening the National Security Powers of Presidents – *All* Presidents, *Not* Just This President" (September 5, 2002).

[**] See, RPC paper "The Lieberman Amendment Throws Out Long-Standing Labor Rules That Help Safeguard Our National Security" (September 19, 2002).

1. THE CUSTOMS SERVICE WAS REQUIRED TO GRANT LEAVE TO ITS AGENTS TO ATTEND FIREARMS GAMES WHEN IT NEEDED THOSE AGENTS TO FIGHT THE WAR ON DRUGS.

A Customs Service narcotics interdiction unit was forced to grant administrative leave to its agents so that they could attend a firearms competition – despite the Service's belief that granting the leave would adversely affect the number of agents available for duty.

The U.S. Customs Service Customs Management Center in Miami, Florida had allowed its agents to take administrative leave to participate in the Florida Law Enforcement Games. Although there was nothing in the collective bargaining agreement with respect to the Florida games, leave had been permitted. In 1998, however, the Miami Center denied a request to attend the games because first, the agency was involved in the narcotics interdiction effort along the southern borders of the United States and it needed all of its agents, and second, the training office had decided only to participate in the World Firearms Games.

The Union filed an unfair labor practice alleging that the Customs Service had unilaterally discontinued a policy without allowing for collective bargaining. The Federal Labor Relations Authority ruled in favor of the union, stating that the past practice could not be changed without bargaining. *U.S. Customs Service and NTEU*, 56 FLRA 809 (No.136) (2000).

2. THE CUSTOMS SERVICE WAS REQUIRED TO BARGAIN OVER MINOR CHANGES TO ITS AGENTS' INSPECTION AREAS AT BOSTON'S LOGAN AIRPORT.

In 1987, The Customs Service was forced to bargain with unions over minor renovations to a customs service office area at Logan International Airport in Boston. The agency planned to renovate the passenger terminal area and Customs office. The renovation of the passenger area consisted solely of a change in the modules used by customs inspectors when they examined the baggage of passengers arriving on international flights. The change in the office area was similarly minor. The only substantive impact that these renovations had on Customs inspectors was that it reduced the examination space available for them.

Nevertheless, the FLRA concluded that the renovations would affect the inspectors' ability to perform their duties and, consequently, held that the agency had an obligation to bargain over the impact and implementation of these changes. *U.S. Customs Service and NTEU*, 29 FLRA 891 (No. 65) (1987).

3. THE CUSTOMS SERVICE WAS REQUIRED TO BARGAIN OVER A 5-MINUTE WALK AT THE BOSTON AIRPORT.

Also in 1987, the unions fought with the Customs Service about a decision that made it necessary for inspectors to walk five minutes from their relocated parking spaces. From about 1983, the Massachusetts Port Authority, owner of the airport, provided free parking to Customs inspectors. However, in August, 1987, the Customs Service received notification from the Port Authority that parking would no longer be available at the then-current site. The Port Authority did offer free parking at an alternative site which was a 4 to 6 minute walk from the Customs Service office.

They union objected that it had not been given an opportunity to bargain. Management contended that it was under no obligation to bargain because (1) parking was not a condition of employment; (2) the Customs Service was not responsible for or involved in the change; (3) the change in parking was insignificant given the proximity of the new lot to the old; and (4) the impact was de minimus. The Administrative Law Judge (ALJ) sided with the union and ordered the Customs Service to bargain over the implementation and impact of a potential change in parking. The order did not indicate how this was to be done, a particular problem inasmuch as the ALJ had no authority over the Port Authority which controlled parking. *NTEU and U.S. Customs Service* (Case No. 1-CA-80056) (Dec. 22, 1988) (affirmed by the Authority itself, Feb. 17, 1989).

4. THE CUSTOMS SERVICE WAS ORDERED TO BARGAIN OVER RELOCATING A REGIONAL OFFICE.

In 1987, the Customs Service notified the National Treasury Employees Union (NTEU) that it would relocate a regional office. NTEU proposed to bargain over this change, and requested that the move be delayed pending completion of negotiations. However, Customs went ahead with the relocation as scheduled.

NTEU complained that Customs had committed an unfair labor practice by relocating before completing its negotiations with NTEU. The ALJ found that Customs violated the Labor-Management Relations Statute by failing to meet its bargaining obligations. The ALJ directed Customs to bargain with NTEU regarding the procedures to be observed in the relocation process and to make appropriate arrangements for employees adversely affected by the relocation. The FLRA, in its 1990 decision, agreed with the ALJ's findings. *Customs Service and NTEU,* 38 FLRA 989 (No. 83) (1990).

5. THE IMMIGRATION AND NATURALIZATION SERVICE WAS FORCED TO BARGAIN WHEN IT TRIED TO BEEF-UP PROTECTION AT THE HONOLULU AIRPORT.

In 1990, the American Federation of Government Employees stymied attempts to increase the number of inspectors available at the Honolulu International Airport because the new shifts resulted in a loss of overtime pay for union members.

The INS employed 40 immigration officers at the Honolulu International Airport in 1990 when the number of international flights arriving at the airport between 10:00 am and 2:00 pm dramatically increased. In response, the INS implemented a new work shift, but did so without providing the union an opportunity to negotiate over the changes. The new shift was initially staffed with volunteers, but that resulted in the loss of overtime pay and night-shift pay to employees working other shifts.

The ALJ, with the FLRA affirming, found against the INS and ordered it to re-institute the old shifts, pay back-pay to those officers who had lost overtime and differential pay as a result of the change, and negotiate with the union prior to any subsequent shift changes. The FLRA decision was handed down 21 months after the INS attempted to respond to changes in airport arrival patterns. *U.S. Immigration and Naturalization Service and AFGE*, 43 FLRA 608 (No. 51) (1991).

6. THE INS WAS FORCED TO BARGAIN ABOUT SHUTTING DOWN A UNIT THAT HAD NO SIGNIFICANT WORKLOAD.

In 1991, the INS decided to abolish an organization unit at one of its facilities because of a steady decrease in activity and staffing at that unit. In the unit's last year, there were no more than two bargaining-unit employees assigned to the unit, and most of the time only one supervisor was needed to handle the workload.

AFGE complained that the INS violated the Labor-Management Relations Statute by abolishing this unit without first negotiating with AFGE. The ALJ found for the INS, but the FLRA disagreed with the ALJ and held that the INS had a duty to bargain. *INS and AFGE*, 47 FLRA 225 (No. 15) (1993).

7. THE INS WAS FORCED TO BARGAIN BEFORE IMPLEMENTING A NEW POLICY ON BODY SEARCHES FOR WEAPONS AND CONTRABAND.

To protect INS employees from physical harm and financial liability, and to protect the INS from lawsuits based on allegations of unlawful searches, the INS began to redraft its body-search policy in 1995. At that time, the INS met periodically with AFGE representatives to discuss the policy. AFGE requested that the new policy not be implemented until completion of all phases of bargaining. In 1997, the INS issued the new

policy unilaterally. AFGE complained that the INS violated the Labor-Management Relations Statute by not giving the union an opportunity to review the new policy before it was implemented.

The ALJ, with the FLRA affirming, found that the INS violated the Statute by implementing the new policy while negotiable proposals were still on the bargaining table. The INS was ordered to cease using its new policy and to complete bargaining with the AFGE. The FLRA decision was not handed down until May 2000. *INS and AFGE*, 56 FLRA 351 (No. 50) (2000).

8. THE INS WAS FORCED TO BARGAIN BEFORE IMPLEMENTING A NEW FIREARMS POLICY.

The INS and AFGE were in negotiations over the agency's proposed revisions to its firearms policy. On October 24, 1989, the union filed a request for assistance with the Federal Services Impasses Panel. A week later, the INS made revisions to the policy although the dispute was pending at the Panel. The Panel declined to assert jurisdiction over the dispute because it did not have the authority to determine whether the proposals were negotiable.

The FLRA then decided that the INS had engaged in an unfair labor practice because, when parties reach an impasse in their negotiations and one party goes to the Panel, the status quo generally must be maintained. By implementing the changes when the Panel had been appealed to, the INS failed to maintain the status quo. As a result, the INS was forced to maintain the status quo with respect to its firearms policy. *INS and AFGE National Border Patrol Council*, 44 FLRA 1065 (No. 85) (1992).

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Source Note: The examples in this paper are not original to the Policy Committee. We have relied on cases and accounts supplied by others. Citations have been provided, however, so that our descriptions of the cases may be confirmed.